

1 Isagani Dela Pena, Jr.
2 Reg. No. 00944-093
3 Propria Persona
4 FCI-Victorville I
5 P.O. Box 5300
6 Adelanto, CA 92301

7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

10 ISAGANI DE LA PENA,)

11 Petitioner,)

12 v.)

13 S.A. HOLENCIK, Warden,)

14 Respondent.)

CASE NO. CV 07-7150-R (AGR)

TRAVERSE MOTION IN RESPONSE TO
GOVERNMENT'S MOTION TO DISMISS
PETITION

15
16 COMES NOW, the Petitioner, Isagani De La Pena, acting in
17 propria persona, respectfully submits this Traverse Motion in
18 Rebuttal to Government's Motion to Dismiss Petition, pursuant to
19 all Federal Rules, Regulations and Procedures, including 28 U.S.C.
20 § 2241.

21 This Motion is based upon the attached Memorandum of Points
22 and Authorities.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

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3 The Petitioner is currently incarcerated at the Federal
4 Correctional Institution-Victorville I in Adelanto, California which
5 is in the Central District of California.

6 The Government contends that the § 2241 Petition filed by
7 the Petitioner should be dismissed for lack of jurisdiction, in that
8 the Petitioner challenges the validity of his convictions and sen-
9 tence, not the manner in which his sentence is being executed.

10 The Petitioner contended that the execution of his sen-
11 tence was illegal because he was improperly convicted of two lesser
12 included offenses and that a competent effective counsel of record
13 would have objected to any conviction on a lesser included offense.

14 The Government argues that the Petition must be dismissed
15 because it attacks Petitioner's conviction and sentence and that
16 § 2255 is the proper vehicle for such attacks.

17 The Government also argued that the Petitioner has not
18 shown that a § 2255 "Savings Clause" applies.
19

20 ARGUMENT

21 The proper vehicle for attacking the execution of sentence
22 is 28 U.S.C. § 2241. [See Grasso v. Norton, 520 F.2d 27 (2d Cir.
23 1975); Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1975)]. A writ
24 of habeas corpus under the terms of that section, however, may be
25 granted by district courts only "within their respective juris-
26 dictions." [Braden v. 30th Judicial Circuit Court, 410 U.S. 484,
27 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973)], the most recent Supreme
28 Court consideration of the jurisdictional requirements of § 2241(a),

1 dispenses with the absolute requirement of Ahrens v. Clark, 335 U.S.
2 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), that the prisoner be
3 located within the district court's jurisdiction. But Braden main-
4 tains the "minimum jurisdictional requisite of the presence of the
5 custodian within the territorial confines of the district court."
6 (Lee supra, 591 F.2d at 591). In this case, the Petitioner is in
7 immediate custodian with the warden of the FCI-Victorville I,
8 Adelanto, California.

9 The Petitioner's challenged the manner in which his
10 sentence was executed by the illegality of a sentence in that,
11 Count 2, distribution of methamphetamine [21 U.S.C. § 841(a)(1)],
12 is a lesser included offense of Count 3, distribution of metham-
13 phetamine near a school [21 U.S.C. § 860]; and Count 5, possession
14 of a firearm by a felon [18 U.S.C. § 922(g)(1)], is a lesser inclu-
15 ded offense of Count 6, possession of a firearm by an unlawful drug
16 user [18 U.S.C. § 922(g)(3)]; in which, constituted ineffectiveness
17 of counsel for failure to object to any conviction on a lesser
18 included offense. The execution of the sentence is illegal and
19 invalid. Result of this ineffectiveness of counsel is that the
20 Petitioner has never had his "unobstructed procedural shot" at
21 challenging the unconstitutional convictions for which he is "legally
22 innocent."

23 The government has tried to construe the Petitioner's
24 § 2241 Petition as a § 2255 and contends lack of jurisdiction. The
25 Petitioner has stated the he is clearly "legally innocent" when it
26 comes to the lesser offense. Under 28 U.S.C. § 2241, pursuant to
27 the "savings clause," the Petitioner has the right to file a
28 § 2241 Petition when he claims to be: [1] legally innocent of the

1 crime for which he has been convicted; and [2] has never had an
2 "unobstructed procedural shot" at presenting this claim. [See
3 Lorenstsen v. Hood, 223 F.3d 950, 954 (2000)]. In U.S. v. Smith,
4 285 F.3d 6, 8 (D.C. Cir. 2000), courts have allowed petitions to
5 proceed under 28 U.S.C. § 2241 when the defendants have "been
6 convicted on the basis of an incorrect understanding of the law,
7 and that § 2255 relief is unavailable to him."

8 The government is requesting evidence to warrant any type
9 of factual, actual, or legal innocence. If the possibility of
10 relief under § 2255 is foreclosed, a federal prisoner who is "act-
11 ually innocent" of the crime of conviction, but who never has had
12 "an unobstructed procedural shot" at presenting a claim of inno-
13 cence, may resort to § 2241. [See, e.g. Wofford v. Scott, 177 F.3d
14 1236 (11th Cir. 1999); In re Davenport, 147 F.3d 605 (7th Cir. 1996);
15 Triestman v. U.S., 124 F.3d 361 (2d Cir. 1997); In re Dorsainvil,
16 119 F.3d 245 (3d Cir. 1997).]

17 In Bousley v. U.S., 523 U.S. 614, 623, 118 S.Ct. 1604,
18 140 L.Ed.2d 828 (1998), the Supreme Court, explained that, "[t]o
19 establish actual innocence, Petitioner must demonstrate that, in
20 light of all the evidence, it is more likely than not that no
21 reasonable juror would have convicted him." (Internal quotation
22 marks omitted). Petitioner bears the burden of proof on this
23 issue by a preponderance of the evidence, and he must show not just
24 that the evidence against him was weak, but that it was so weak
25 that "no reasonable juror" would have convicted him. [See Dejan
26 v. U.S., 208 F.3d 682, 686 (8th Cir. 2000)]. In making or re-
27 butting this showing, the Petitioner has had an obstructed pro-
28 cedural shot at presenting a claim of innocence, and is not just

1 mere legal insufficiency." (Bousley, 523 U.S. at 623, 118 S.Ct.
2 1604). Here, the fact that the Petitioner's convictions for two
3 (2) Counts (Counts II and III) constitute multiple punishments for
4 the same offense in violation of the Double Jeopardy Clause and
5 requires vacation of a conviction as to the lesser offense, in
6 which, is well settled law at this time and cannot be disputed.
7 [See U.S. V. CABBACCANG, 481 F.3d 1176, 1180 (9th Cir. 2007)].
8
9

10 CONCLUSION

11 For the reasons noted above, the Petition should be
12 GRANTED in its entirety under 28 U.S.C. § 2241 in which, this
13 Honorable Court has jurisdiction and DENY the government's Motion
14 to Dismiss.

15 The Petitioner also respectfully requests this Honorable
16 Court to allow/permit the Petitioner to submit another Rebuttal/
17 Traverse in rebuttal to the governments briefing on the merits of
18 Petitioner's claims, should the Court DENY the government's Motion
19 to Dismiss.

20 **RESPECTFULLY SUBMITTED** on this 20th day of February, 2008.
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22 Isagani De La Pena
23 Isagani De La Pena/Petitioner
24 Propria Persona
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CERTIFICATE OF SERVICE

I, Isagani De La Pena hereby certify that I have served a true and correct copy of the following:

TRAVERSE MOTION

Which is deemed filed at the time it was delivered to prison authorities for forwarding, Houston v. Lack, 101 L.Ed.2d 245 (1988), upon the defendant/defendants and or his attorney/attorneys of record, by placing same in a sealed, postage prepaid envelope addressed to:

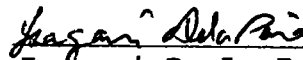
United States District Court
Central District of California
Clerk of the Court
312 N. Spring Street
Los Angeles, CA 90012

Eric D. Vandavelde
Assistant U.S. Attorney
U.S. Attorneys Office
Central District of California
312 N. Spring Street
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and deposited same in the United States Mail at the Federal Correctional Institution, Adelanto, California - FCI-Victorville I Mail Room.

I declare, under penalty of perjury (Title 28 U.S.C. §1746), that the foregoing is true and correct.

Dated this 20th day of February, 2008.



Isagani De La Pena/Petitioner

Propria Persona